

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE SIERRA CLUB; GEORGIA
ENVIRONMENTAL ORGANIZATION,
INC.; COOSA RIVER BASIN
INITIATIVE, INC.; TROUT
UNLIMITED; and OGEECHEE RIVER
VALLEY ASSOCIATION, INC.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; CAROL M.
BROWNER, Administrator,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; and
JOHN HANKINSON, Regional
Administrator, UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY REGION IV,

Defendants.

CIVIL ACTION FILE NO.

1: 94-CV-2501-MHS



10513757

CONSENT DECREE

WHEREAS, this case involves claims by the Sierra Club; Georgia Environmental Organization, Inc.; Coosa River Basin Initiative, Inc.; Trout Unlimited; and Ogeechee River Valley Association, Inc. (collectively "Plaintiffs") under the Clean Water Act, 33 U.S.C. § 1251, et seq. ("Act" or "CWA"), and the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq. ("APA"), to compel the United States Environmental Protection Agency; Carol M. Browner, Administrator; and John Hankinson, Regional

Administrator, EPA Region IV (collectively "EPA"), to identify waters for listing pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), and to establish total maximum daily loads ("TMDLs") for those waters; and

WHEREAS, Section 303(d) of the CWA, 33 U.S.C. § 1313(d), and EPA's implementing regulations, 40 C.F.R. § 130.7(b), require (1) the identification of waters for which the required effluent limitations or other controls are not stringent enough to implement water quality standards applicable to such waters or for which controls on thermal discharges are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife (the "Section 303(d) List"), and (2) the establishment of a priority ranking for such waters;

WHEREAS, Section 303(d) of the CWA, 33 U.S.C. § 1313(d), and EPA's implementing regulations, 40 C.F.R. § 130.7(b) require the establishment of TMDLs for all waters identified pursuant to Sections 303(d)(1)(A) and 303(d)(1)(B) of the CWA, 33 U.S.C. §§ 1313(d)(1)(A) and 1313(d)(1)(B);

WHEREAS C.F.R. § 130.7(c)(1) and Section 303(d)(1)(C) of the CWA, 33 U.S.C. § 1313(d)(1)(C), require that TMDLs shall be established at levels necessary to attain and maintain applicable narrative and numerical water quality standards with seasonal variations and a margin of safety which takes into account any

lack of knowledge concerning the relationship between effluent limitations and water quality;

WHEREAS, Section 303(d)(1)(D) of the CWA, 33 U.S.C. § 1313(d)(1)(D), requires that estimates of total maximum daily thermal loads shall include a calculation of the maximum heat input that can be made into each waterbody or part of a waterbody, and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in the waterbody or part of a waterbody;

WHEREAS, in their Complaint filed in this action, as amended, Plaintiffs allege, inter alia, that:

a. EPA's failure to establish TMDLs for Georgia's water quality limited segments (WQLSs) constitutes a failure to perform a mandatory duty under Section 303(d)(2) of the Clean Water Act (Count III).

b. EPA's failure to promulgate and implement TMDLs for Georgia's WQLSs constitutes agency action unlawfully withheld or unreasonably delayed; and is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law ("Count IV").

c. EPA's failure to establish a schedule for submission of TMDLs by the State of Georgia constitutes a failure to perform a mandatory duty under 40 C.F.R. § 130.7(d); constitutes agency action unlawfully withheld or unreasonably delayed; and is

arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law (Count V).

WHEREAS, on March 26, 1996 and September 3, 1996, orders were entered in this action by the United States District Court for the Northern District of Georgia, which orders affected the matters addressed in this Consent Decree and accompanying Settlement Agreement;

WHEREAS, on December 17, 1996 the United States District Court for the Northern District of Georgia entered a Consent Decree which, in conjunction with a concurrently executed Settlement Agreement, resolved the "WQLS" issues in this action;

WHEREAS, on November 4, 1996, Defendant EPA lodged an appeal to the United States Court of Appeals for the Eleventh Circuit from the orders of the District Court entered in this action on March 26, 1996 and September 3, 1996;

WHEREAS, 40 C.F.R. §122.43(b)(2) requires new or reissued National Pollutant Discharge Elimination System (NPDES) permits, and to the extent allowed under 40 C.F.R. § 122.62, modified or revoked and reissued NPDES permits, to incorporate each of the applicable requirements referenced in 40 C.F.R. §§ 122.44 and 122.45;

WHEREAS, 40 C.F.R. § 122.44(d)(1)(vii)(A) requires that when developing water quality-based effluent limitations, the permitting authority shall include in each NPDES permit, applicable, conditions necessary to achieve water quality

standards under Section 303 of the CWA, 33 U.S.C. § 1313, including development and inclusion of effluent limits that ensure that the level of water quality to be achieved by limits on point sources is derived from and complies with all applicable water quality standards;

WHEREAS, 40 C.F.R. § 122.44(d)(1)(vii)(B) requires that each NPDES permit include conditions necessary to achieve water quality standards under Section 303 of the CWA, 33 U.S.C. § 1313, including development and inclusion of effluent limits to protect narrative and numeric water quality criteria consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. § 130.7;

WHEREAS, EPA intends to work with the State of Georgia to ensure that the requirements of 40 C.F.R. §§ 122.44(d)(1)(vii)(A) and (B) are met;

WHEREAS, EPA intends to work with the State of Georgia in an assistance role, providing tools such as scientific research, technical tools, technology transfer and training, or financial and staffing support;

WHEREAS, when EPA establishes TMDLs, EPA will do so following public notice and comment and, where significant comment is not received, expects to establish TMDLs within six months of the beginning of public notice;

WHEREAS, Section 303(e) of the CWA, 33 U.S.C. § 1313(e), and EPA's implementing regulations, 40 C.F.R. § 130.5, require each state to establish and maintain a continuing planning process (CPP) that is consistent with the CWA and to manage its water quality program to implement the processes specified in the CPP;

WHEREAS, Section 303(e) of the CWA, 33 U.S.C. § 1313(e), and EPA's implementing regulations allow each state to determine the format of its CPP as long as it meets the minimum requirements of the CWA and its implementing regulations, including a clear description of the process for developing TMDLs in accordance with Section 303(d) of the CWA, 33 U.S.C. § 1313(d), and 40 C.F.R. § 130.7(a);

WHEREAS, Section 303(e) of the CWA, 33 U.S.C. § 1313(e), and EPA's implementing regulations require each state to revise the CPP as necessary, and require that EPA review the State's CPP from time to time for the purpose of insuring the CPP is consistent with the CWA;

WHEREAS, in order to resolve this lawsuit, the parties also have entered into a Settlement Agreement which has been filed separately with the Court; its terms are not incorporated into this Consent Decree;

WHEREAS, Plaintiffs and EPA have agreed to a settlement of this action without any admission of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this action;

WHEREAS, by entering into this Consent Decree, the parties do not waive or limit any claim or defense, on any grounds, related to any final agency action taken pursuant to this Decree, including EPA's approval, disapproval and/or establishment of Section 303(d) Lists or TMDLs in Georgia, or to any agency inaction;

WHEREAS, it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation; and

WHEREAS, the Court finds and determines that this Consent Decree represents a just, fair, adequate and equitable resolution of the claims raised in this action.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I. PARTIES

The Parties to this Consent Decree are Plaintiffs and EPA.

II. PARTIES BOUND

This Consent Decree applies to, is binding upon, and inures to the benefit of Plaintiffs (and their successors, assigns, and designees) and EPA.

III. JURISDICTION

For purposes of entry and enforcement of this Consent Decree only, the Parties to this Consent Decree agree that the Court specifically retains jurisdiction over this action and may issue

such further orders or directions as may be necessary or appropriate to construe, implement, modify, or enforce the terms of this Consent Decree, including resolving any disputes arising under this Consent Decree, and for granting any further relief as the interests of justice may require.

IV. DEFINITIONS

For the purposes of this Decree, the following terms shall have the meaning provided below:

a. "Day" means a calendar day unless expressly stated to be a working day. In determining any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday or federal holiday, the period shall run until the close of business of the next working day.

b. "Consent Decree" means this decree.

c. "Effective Date" means the date upon which this Consent Decree is entered by the Court.

d. "EPA" means the United States Environmental Protection Agency; Carol M. Browner, Administrator; and John Hankinson, Regional Administrator, EPA Region IV.

e. "Execute" or "Execution" means that both parties have fully signed original counterparts to this Consent Decree and have caused such documents to be delivered to each other.

f. "Plaintiffs" means the Sierra Club; Georgia Environmental Organization, Inc.; Coosa River Basin Initiative,

Inc.; Trout Unlimited; and Ogeechee River Valley Association, Inc.

g. "Section 303(d) List" means the current or any future list required to be submitted by Section 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2), and 40 C.F.R. § 130.7(b) that identifies those WQLSs still requiring TMDLs for which applicable technology-based and other controls are not stringent enough to implement applicable water quality standards and establishes a priority ranking for such water quality limited segments.

h. "Settlement Agreement" means the agreement between the parties executed concurrently with this Decree.

i. "Total Maximum Daily Load" (TMDL) has the meaning provided at Section 303(d)(1)(C) of the CWA, 33 U.S.C. § 1313(d)(1)(C), and 40 C.F.R. § 130.2(i), as codified as of the Effective Date of this Decree, or as subsequently amended; for purposes of this Decree, the term also refers to total maximum daily thermal load as defined in this Decree.

j. "Total Maximum Daily Thermal Load" has the meaning provided at Section 303(d) of the CWA, 33 U.S.C. § 1313(d), as codified as of the Effective Date of this Decree, or as subsequently amended.

k. The "United States" means the United States of America, including its officers, agencies, departments and instrumentalities;

1. "Water Quality Limited Segments" refers to those waters identified on the "Section 303(d) List".

m. "Establish" for purposes of this Decree means (1) final agency action taken by EPA on a TMDL after proposal for public comment of that TMDL by EPA or (2) final agency action taken by the State of Georgia on a TMDL after proposal for public comment of that TMDL by the State. For purposes of this Decree, the term establish also means estimate for total maximum daily thermal loads.

n. "Continuing Planning Process" or "CPP" has the meaning provided at Section 303(e) of the CWA, 33 U.S.C. § 1313(e), and at 40 C.F.R. § 130.5, as of the Effective Date of this Decree, or as subsequently amended.

o. "Performance Partnership Agreement" or "PPA" means the State of Georgia's annual PPA. If the PPA (which serves as an annual workplan) is renamed in the future, such workplan will serve as the PPA for purposes of this Consent Decree.

V. TERMS OF AGREEMENT

A. SCHEDULE

1. Plaintiffs and EPA agree to the schedule set forth below for the State of Georgia to establish TMDLs for the impaired waterbodies and thermally impaired waterbodies described in those paragraphs, subject to paragraph B immediately below. If Georgia fails to establish TMDLs according to the schedule set forth in

paragraphs 4-9 below, then EPA will take action as specified in those paragraphs.

2. In fulfilling its obligations under this Consent Decree, EPA is under no obligation to establish TMDLs for any water not on the State Section 303(d) List or removed from the State's Section 303(d) list consistent with the provisions of the Clean Water Act and EPA's implementing regulations.

3. On or about August 30, 1997, EPA shall propose for public comment TMDLs for no less than 20% of the waterbodies identified in Georgia's 1996 Section 303(d) List as amended in December of 1996. A list of the waterbodies for which EPA will propose TMDLS for public comment in accordance with this paragraph is attached hereto as "Appendix A." EPA will establish TMDLs following public notice and comment within a reasonable time, and, where significant comment is not received, expects to establish TMDLs by February 28, 1998.

4. If Georgia fails to propose for public comment by June 30, 1999, TMDLs for each waterbody identified in Georgia's 1998 Section 303(d) List, whether such Section 303(d) List is prepared by Georgia or by EPA, that is impacted by a NPDES permitted point source or point sources, and that is located in the Savannah/Ogeechee Basins, then EPA shall propose such TMDLs by August 30, 1999. In the event EPA proposes such TMDLs, EPA will establish TMDLs following public notice and comment within a reasonable time, and, where significant comment is not received,

expects to establish TMDLs by February 28, 2000, unless Georgia submits and EPA approves such TMDLs prior to EPA establishing such TMDLs.

5. If Georgia fails to propose for public comment by June 30, 2000, TMDLs for each waterbody identified in Georgia's 2000 Section 303(d) List, whether such Section 303(d) List is prepared by Georgia or by EPA, and that is located in the Suwannee/Satilla/ Ochlocknee/St. Mary's Basins, then EPA shall propose such TMDLs by August 30, 2000. In the event EPA proposes such TMDLs, EPA will establish TMDLs following public notice and comment within a reasonable time, and, where significant comment is not received, expects to establish TMDLs by February 28, 2001, unless Georgia submits and EPA approves such TMDLs prior to EPA establishing such TMDLs.

6. If Georgia fails to propose for public comment by June 30, 2001, TMDLs for each waterbody identified in Georgia's 2000 Section 303(d) List, whether such Section 303(d) List is prepared by Georgia or by EPA, and that is located in the Oconee/Ocmulgee/Altamaha Basins, then EPA shall propose such TMDLs by August 30, 2001. In the event EPA proposes such TMDLs, EPA will establish TMDLs following public notice and comment within a reasonable time, and, where significant comment is not received, expects to establish TMDLs by February 28, 2002, unless Georgia submits and EPA approves such TMDLs prior to EPA establishing such TMDLs.

7. If Georgia fails to propose for public comment by June 30, 2002, TMDLs for each waterbody identified in Georgia's 2002 Section 303(d) List, whether such Section 303(d) List is prepared by Georgia or by EPA, and that is located in the Flint/Chattahoochee Basins, then EPA shall propose such TMDLs by August 30, 2002. In the event EPA proposes such TMDLs, EPA will establish TMDLs following public notice and comment within a reasonable time, and, where significant comment is not received, expects to establish TMDLs by February 28, 2003, unless Georgia submits and EPA approves such TMDLs prior to EPA establishing such TMDLs.

8. If Georgia fails to propose for public comment by June 30, 2003, TMDLs for each waterbody identified in Georgia's 2002 Section 303(d) List, whether such Section 303(d) List is prepared by Georgia or by EPA, and that is located in the Coosa/Tallapoosa/Tennessee Basins, then EPA shall propose such TMDLs by August 30, 2003. In the event EPA proposes such TMDLs, EPA will establish TMDLs following public notice and comment within a reasonable time, and, where significant comment is not received, expects to establish TMDLs by February 28, 2004, unless Georgia submits and EPA approves such TMDLs prior to EPA establishing such TMDLs.

9. If Georgia fails to propose for public comment by June 30, 2004, TMDLs for each waterbody identified in Georgia's 2004 Section 303(d) List, whether such Section 303(d) List is

prepared by Georgia or by EPA, and that is located in the Savannah/Ogeechee Basins, then EPA shall propose such TMDLs by August 30, 2004. In the event EPA proposes such TMDLs, EPA will establish TMDLs following public notice and comment within a reasonable time, and, where significant comment is not received, expects to establish TMDLs by February 28, 2005, unless Georgia submits and EPA approves such TMDLs prior to EPA establishing such TMDLs.

B. CONTINUING PLANNING PROCESS

1. By March 1, 1998, EPA will review Georgia's current CPP to determine whether it is consistent with Section 303(e) of the CWA, 33 U.S.C. § 1313(e), and EPA's implementing regulations at 40 C.F.R. § 130.5, as of the effective date of this Consent Decree, or as amended. The CPP may consist of an index incorporating applicable provisions from other documents by reference. By March 1, 1998, EPA will provide a preliminary written summary of its review to the state, Plaintiffs, and any other interested parties.

2. By August 1, 1998, EPA will determine whether the CPP is consistent with the CWA and its implementing regulations, and will provide the State and Plaintiffs with a final written summary of EPA's review of the CPP that will include any recommendations for improvement.

3. If EPA finds that Georgia's CPP is not consistent with the CWA and its implementing regulations, and if the State does

not modify its CPP in response to EPA's review to be consistent with the CWA and its implementing regulations, EPA shall take appropriate action as provided under the CWA and accompanying regulations.

C. WORK PLANS

1. Whereas the parties acknowledge that the State of Georgia has stated its intent, subject to adequate funding, to a) establish TMDLs in accordance with the schedule set out in this Decree; b) incorporate TMDLs into affected NPDES permits within 18 months of TMDL development; c) work toward the review and, as needed, reissuance of all individual NPDES permits within a given basin concurrently, with a goal of establishing basin-wide permitting; and d) continue to comply with 40 C.F.R. § 122.4(i) (A copy of the State's letter is attached hereto as "Attachment A");

2. EPA agrees that it will propose incorporation of the terms described above in subparagraph V.C.1(a)-V.C.1(d) into future Georgia/EPA Performance Partnership Agreements (PPA).

3. By proposing such terms or language for inclusion in the PPA, EPA does not obligate itself to perform, or ensure the performance of, such terms or language.

D. EPA REVIEW

1. Prior to October 31, 1999 and prior to October 31st of every odd-numbered year thereafter until and including 2005, EPA will conduct a biennial review of the TMDL program in Georgia.

By those dates, EPA will make a copy of its written review available to Plaintiffs, the State of Georgia, and other interested parties. Such program review shall review, among other things: TMDL program activities of the State of Georgia and of EPA; TMDL program processes described in the CPP pursuant to 40 C.F.R. § 130.7(a); whether NPDES permits issued by Georgia or EPA comply with 40 C.F.R. § 122.44(d)(1)(vii)(A), 40 C.F.R. § 122.44(d)(1)(vii)(B), and 40 C.F.R. § 122.4(i), as of the Effective Date of this Consent Decree or as amended; whether the TMDLs established pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(d), and 40 C.F.R. § 130.7, have been incorporated into Georgia's NPDES permits; and shall identify those permits reviewed by EPA that were issued for waters for which a TMDL has been established.

E. EPA REPORTING

1. On October 31st of each year, EPA shall submit to Plaintiffs and the Court a report detailing EPA's progress in meeting the commitments of this Decree. The report shall include:

- a) Identification of TMDLs proposed or established during the reporting period;
- b) Review of EPA's compliance with any other terms of this Decree during the reporting period.

VI. SECURING COURT APPROVAL

Plaintiffs agree to join in and support such legal proceedings as necessary to secure the Court's approval and entry of this Consent Decree. It is understood that this Consent Decree, once entered by the Court and made an order of the Court supersedes the Order of the Court of September 3, 1996.

VII. EFFECTIVE DATE

This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the District Court does not enter this Consent Decree, this Consent Decree shall not become effective.

VIII. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

This Consent Decree shall terminate after fulfillment of all the obligations of EPA under this Consent Decree. When EPA's obligations under this Decree and the Settlement Agreement have been completed, Counts III, IV, and V of this case shall be dismissed with prejudice.

IX. FORCE MAJEURE

The parties recognize that the performance of this Consent Decree is subject to fiscal and procurement laws and regulations of the United States, which include but are not limited to the Anti-Deficiency Act, 31 U.S.C. §§ 1341, et seq. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with the timetables contained in this

Consent Decree. Such situations include, but are not limited to, sufficient funds not being appropriated as requested, appropriated funds not being available for expenditure, Congressional action affecting EPA's commitments under this Decree, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to such circumstances, any resulting failure to meet the timetables set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, and any deadlines occurring within 120 days of the termination of the delay shall be extended one day for each day of the delay. EPA will provide Plaintiffs with notice as soon as is reasonably possible in the event that EPA invokes this term of the Consent Decree and will provide Plaintiffs with an explanation of EPA's basis for invoking this term. Plaintiffs may challenge the invocation of this term of the Consent Decree under the Dispute Resolution terms of this Consent Decree, and EPA shall bear the burden of justifying its invocation of this term.

X. DISPUTE RESOLUTION

In the event of a disagreement between the parties concerning the interpretation of any aspect of this Decree, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. If the parties cannot reach an agreed resolution within 30 days after

receipt of the notice by the other party, then either party may petition the Court to resolve the dispute.

XI. MODIFICATIONS AND EXTENSIONS

A. Any dates set forth in this Consent Decree may be extended by written agreement of the parties and ^{subject to the approval of the} ~~notice to the~~ Court. To the extent the parties are not able to agree to an extension, either party may seek a modification to this Decree in accordance with the procedures specified below:

1. If a party files a motion requesting modification of a date or dates established by this Decree and provides notice to the other party at least thirty (30) days prior to filing such motion, and files the motion at least sixty (60) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically extend the date for which modification is sought. Such extension shall remain in effect until the earlier to occur of (i) a dispositive ruling by this Court on such motion, (ii) the date sought in the modification, or (iii) sixty (60) days after the original date for which modification is sought. The party may move the Court for a longer extension.

2. If a party files a motion requesting modification of a date or dates established by this Decree totaling thirty (30) days or less, provides notice to the other party at least thirty (30) days prior to the filing of such motion, and files

the motion at least seven (7) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, stay the date for which modification is sought. Such stay shall remain in effect until the earlier to occur of (i) a dispositive ruling by this Court on such motion, or (ii) the date sought in the modification.

3. If a party seeking modification does not provide notice pursuant to subparagraph XI.A.1 or XI.A.2 above, that party may move the Court for a stay of the date for which modification is sought. The party seeking modification under this subparagraph XI.A.3 shall give notice to the other party as soon as possible of its intent to seek a modification and/or stay of the date sought to be modified. The notice provided under this subparagraph XI.A.3 and any motion for stay shall demonstrate why the party could not have utilized the notification procedures set forth in subparagraphs XI.A.1 and XI.A.2 immediately above.

4. Any motion to modify the schedule established in this Decree shall be accompanied by a motion for expedited consideration.

B. This Decree may be modified by written agreement of the parties and approval of the Court. Nothing in this Decree, or in the parties' agreement to its terms, shall be construed to limit the equitable powers of the Court to modify those terms upon a showing of good cause by any party. Good cause includes, but is

not limited to, changes in the law, or the implementing regulations affecting EPA's actions under this Decree.

XII. NOTICE

Any notice required or made with respect to this Consent Decree shall be in writing and shall be effective upon receipt. For any matter relating to this Consent Decree, the contact persons are:

For the Plaintiffs:

Douglas P. Haines
Georgia Center for Law in the Public Interest
264 North Jackson Street
Athens, Georgia 30601

and

Eric E. Huber
Sierra Club Legal Defense Fund, Inc.
400 Magazine Street
Suite 401
New Orleans, LA 70130

For the United States:

Associate General Counsel, Water Division
Office of General Counsel, 2355
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Director and Regional Counsel
Environmental Accountability Division
EPA Region IV
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

and

Chief
Environmental Defense Section
Environment & Natural Resources Division

United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Consent Decree.

XIII. SCOPE OF JUDICIAL REVIEW

Nothing in the terms of this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Consent Decree, except for the purpose of determining EPA's compliance with and enforcing the terms of this Consent Decree.

XIV. AGENCY DISCRETION

Except as expressly provided herein, or in any supplement to this Consent Decree, nothing in this Consent Decree shall be construed to limit or modify the discretion accorded EPA by the Clean Water Act, 33 U.S.C. §§ 1251-1387, or by general principles of administrative law.

XV. REPRESENTATIVE AUTHORITY

Each undersigned representative of the parties to this Consent Decree certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Consent Decree, and to legally bind such party to this

Consent Decree. By signature below, all of the Plaintiffs and EPA consent to entry of this Consent Decree.

XVI. SEVERABILITY

The various terms, paragraphs, and sections contained herein shall be deemed separable and severable. If any provision of this Consent Decree is deemed invalid or unenforceable, the balance of the Consent Decree shall remain in full force and effect.

XVII. ENTIRE AGREEMENT

This Consent Decree and the Settlement Agreement are the entire agreement between Plaintiffs and EPA concerning the TMDL and TMDL Schedule Claims in this case, including Counts III, IV, and V of the Complaint. All prior conversations, meetings, discussions, drafts and writings of any kind are specifically superseded by this Consent Decree and the Settlement Agreement.

XVIII. MUTUAL DRAFTING

It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiffs and EPA. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

XIX. COUNTERPARTS

This Consent Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party had signed all other counterparts.

XX. RELEASE BY PLAINTIFFS

Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final resolution between Plaintiffs and EPA of the TMDL and Schedule Claims, including Counts III, IV, and V of the Complaint. Except for claims which may arise under the provisions of this Consent Decree, and as provided in Section VIII and XXII, Plaintiffs hereby release, discharge, and covenant not to assert (by way of the commencement of an action, the joinder of EPA in an existing action or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which it may have had, or may now or hereafter have, against EPA based upon matters which have been asserted in Counts III, IV, and V of the Complaint.

XXI. APPEAL BY EPA

Following entry of this Decree by the Court, EPA shall dismiss with prejudice its appeal of the Court's orders of March

26, 1996, and August 30, 1996, in full. EPA reserves the right to appeal the Court's order of April 22, 1997, regarding an award of attorneys' fees to Plaintiffs.

XXII. PLAINTIFFS' RESERVATION OF RIGHTS

This Consent Decree does not waive or limit in any way Plaintiffs' rights except as expressly provided in this Consent Decree. Nothing in this Consent Decree shall be construed to waive or limit Plaintiffs' right to challenge or file suit on (1) Georgia's 1998 or subsequent Section 303(d) Lists, whether such Section 303(d) List is prepared by Georgia or by EPA; (2) any TMDLs, whether such TMDLs are established by Georgia or by EPA; or (3) the issuance, reissuance, modification, or revocation and reissuance of NPDES permits.

XXIII. USE OF CONSENT DECREE

This Consent Decree shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers, or any person affiliated with it.

XXIV. COMPLIANCE WITH OTHER LAWS

Nothing in this Decree relieves EPA of the obligation to act in a manner consistent with applicable Federal, State or local law, including the notice and comment and other provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-599, 701-706, and applicable appropriations and law. No provision of this Decree

shall be interpreted as or constitute a commitment or requirement that the United States is obligated to pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other provision of law.

XXV. APPLICABLE LAW

This Consent Decree shall be governed and construed under the laws of the United States.

XXVI. THIRD-PARTY BENEFICIARIES

Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree.

XXVII. COSTS

EPA agrees that Plaintiffs are entitled to reasonable attorneys' fees and costs accrued as of the Effective Date of this Decree on their TMDL and TMDL Schedule Claims, including Counts III, IV, and V of the Complaint. The Parties will attempt to reach agreement as to the appropriate amount of the recovery. Plaintiffs shall file any request for attorney's fees within 60 of the Effective Date of this Decree. EPA shall have 30 days to respond to Plaintiffs' fee request.

For the United States of America:

LOIS J. SCHIFFER
Assistant Attorney General
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